



Harry Tanner (“Tanner”) was convicted in Marion Superior Court of Class A misdemeanor public indecency. He appeals, raising one issue: whether he received ineffective assistance of counsel. Concluding that Tanner received effective assistance, we affirm.

### **Facts and Procedural History**

On September 14, 2005, Indianapolis Police Officers Steven Brinker and Chris Faulds were investigating vice activity in the vicinity of the 700 block of North Senate Avenue. Tanner approached the officers’ unmarked car and began conversing with the officers. Officer Faulds got out of the front passenger seat and climbed into the backseat. Without any invitation to do so, Tanner got in the car and sat in the front passenger seat.

Officer Brinker began driving while the three talked about the weather. Officer Faulds remarked that he was getting bored with the conversation and that they “were looking for a little bit more.” Tr. pp. 7-8. Officer Brinker then inquired as to the length of Tanner’s penis; Tanner replied that it was seven and a half inches. Tr. p. 9. Tanner unzipped his pants, pulled out his genitalia, and began fondling himself. At this time, the car was in the 800 block of North Senate Avenue and several people were on the sidewalk in view of the police vehicle. When Tanner asked the officers to buy him some liquor, Officer Faulds arrested Tanner for public indecency. Later, police discovered what they believed to be a crack pipe in the front pocket of Tanner’s backpack.

The State charged Tanner with Class D felony possession of paraphernalia and Class A misdemeanor public indecency. At the conclusion of a bench trial, the court

convicted Tanner of public indecency and sentenced him to 180 days. Tanner now appeals.

### **Discussion and Decision**

Under Strickland v. Washington, 466 U.S. 668 (1984), a claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance so prejudiced the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Robinson v. State, 775 N.E.2d 316, 319 (Ind. 2002). Isolated poor strategy or bad tactics do not necessarily amount to ineffective assistance of counsel. Davis v. State, 675 N.E.2d 1097, 1100 (Ind. 1996).

Tanner contends that his trial counsel was ineffective because she failed to raise entrapment as a defense to the public indecency charge. The decision of whether or not to present a defense can be considered a matter of trial strategy and will not be lightly second-guessed. Whitener v. State, 696 N.E.2d 40, 43 (Ind. 1998).

Indiana Code section 35-41-3-9 governs the defense of entrapment and provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

Ind. Code § 35-41-3-9 (2004). The State may rebut this defense either by disproving police inducement or by proving the defendant's predisposition to commit the crime. Riley v. State, 711 N.E.2d 489, 494 (Ind. 1999)

Here, the record indicates that Tanner entered the unmarked police vehicle without being invited to do so. Tr. p. 5. After an exchange about the length of his penis, Tanner, without urging or invitation by the undercover officers, unzipped his pants, exposed his genitalia, and began to fondle himself. Tr. pp. 7-8. From this evidence, a reasonable trier of fact could conclude that the police did not induce Tanner to commit the offense of public indecency. Thus, Tanner fails to demonstrate how, but for counsel's failure to raise entrapment as a defense, the result of his trial would have been different. See Robinson, 775 N.E.2d at 319. Trial counsel's assistance was not rendered ineffective for failing to raise an entrapment defense on Tanner's behalf.

Affirmed.

NAJAM, J., and MAY, J., concur.